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## Indigents, Hospital Admissions and Equal Protection

Charles S. DeRousie

*University of Michigan Law School*

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## INDIGENTS, HOSPITAL ADMISSIONS AND EQUAL PROTECTION

### I. INDIGENTS' ACCESS TO HOSPITAL CARE

Many persons cannot afford essential hospital care. Government programs provide hospital care for the very poor<sup>1</sup> and for the elderly,<sup>2</sup> while other persons enjoy private health insurance coverage of all or most hospitalization costs.<sup>3</sup> Still there exists a stratum untouched by either system and composed of non-elderly indigents who do not qualify for welfare or Medicaid but nevertheless have incomes falling below poverty guidelines.<sup>4</sup> This stratum is partially composed of the "medically needy,"<sup>5</sup> and arises when states set maximum income limits for Medicaid below poverty guidelines.<sup>6</sup>

Furthermore, although most public hospitals are required by law to admit indigent patients<sup>7</sup> and many private hospitals as a self-imposed rule admit all patients in need of medical care, the doors of other public and private hospitals are closed to them. It is difficult if not impossible to document the extent to which indigents are denied hospital services because of their inability to pay.<sup>8</sup> Nevertheless, there are indications that the problem is a substantial one.

The author surveyed ten hospitals in each of ten states, in-

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<sup>1</sup> Under Medicaid, federal and state governments pay for inpatient hospital services for those who qualify, 42 U.S.C. § 1396a(a)(10) (1970). For a discussion of Medicaid see Bernard & Feingold, *The Impact of Medicaid*, 1970 WIS. L. REV. 726 (1970).

<sup>2</sup> 42 U.S.C. § 1395d(a)(iii) (1970). Medicare subsidizes the inpatient hospital care of enrollees. *Id.* § 1395(d) (1970).

<sup>3</sup> Nearly 163 million persons were covered by hospital expense insurance at the end of 1967. HEALTH INSURANCE COUNCIL AND HEALTH INSURANCE INSTITUTE, 1968 SOURCE BOOK OF HEALTH INSURANCE DATA 18 (1968).

<sup>4</sup> For the purposes of this article the term medically indigent will be used to identify those persons unable to obtain essential medical care because of their poverty. Under Office of Economic Opportunity poverty guidelines, a nonfarm family of four with an annual income below \$4,000 is living in poverty. OEO Instruction No. 6004 lc., Nov. 19, 1971, 37 Fed. Reg. 444 (1972).

<sup>5</sup> The term describes those persons whose incomes exceed limits set by the state regulations for categorical assistance without regard to medical expenses which, if deducted, would drive their incomes below the state maximums. Inclusion of these persons in a state's medical program is optional. 42 U.S.C. § 1396d(a) (1970).

<sup>6</sup> For example, the maximum annual income level for a family of four to qualify as medically needy in Virginia is \$3,300. 1 CCH MEDICARE-MEDICAID GUIDE ¶ 15,652 (1971).

<sup>7</sup> See e.g., COLO. REV. STAT. § 124-4-3 (1963).

<sup>8</sup> Compounding the documentation problem is the fact that many indigents do not seek hospital services on the assumption they will be denied.

cluding hospitals of varying sizes and classifications.<sup>9</sup> Five of the forty-five replies indicated the hospital did not admit all indigents in need of medical care.<sup>10</sup> The primary reason given was that prospective patients not covered by hospital insurance or government programs such as Medicaid or Medicare were usually unable to produce a required preadmission deposit. This practice of requiring a preadmission deposit seems to be common.<sup>11</sup>

Another indication that the poor are being denied admission to hospitals is the number of law suits being brought by poor persons against hospitals throughout the country. These suits seek to compel hospitals which are recipients of grants under the Hill-Burton program<sup>12</sup> to provide free or reduced cost hospital care to persons unable to pay for it.<sup>13</sup> Plaintiffs have successfully argued that the federal statute implies a right of action in affected parties to enforce compliance by private hospital-recipients of Hill-Burton funds.

In addition to the many poor families who do not qualify for welfare assistance and the accompanying Medicaid benefits,<sup>14</sup> indigents are also denied hospital services because they have

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<sup>9</sup> The survey was conducted in the fall of 1971. Responses received by the author are on file with the *University of Michigan Journal of Law Reform*. The number of beds per responding hospital ranged from 63 to 2,173. These hospitals included public, private nonprofit, and private for-profit institutions.

<sup>10</sup> These respondents included three public, one private nonprofit, and one private for-profit hospital.

<sup>11</sup> See, e.g., *LeJuene Road Hosp., Inc. v. Watson*, 171 So.2d 202 (Fla. Dist. Ct. App. 1965). On her doctor's advice a mother took her son to defendant hospital for an appendectomy. There the eleven year old was taken upstairs, undressed, examined, and given medication. Although it was a Saturday evening, plaintiffs were then told to leave the hospital since the mother was unable to produce a \$200 cash deposit after two hours. There was evidence that the boy was seriously ill when he went to another hospital to have the operation performed. The Florida District Court of Appeal affirmed a \$5,000 judgment holding the hospital liable to the boy for wrongful discharge of a patient. The court indicated the result would have been different had the hospital not performed procedures amounting to the admission of the patient. 171 So.2d at 203.

One study documented cases of hospitals in five states which require preadmission deposits for those who do not have outside resources to pay for their hospitalization. NATIONAL LEGAL PROGRAM ON HEALTH PROBLEMS OF THE POOR, STATEMENT OF THE NATIONAL LEGAL PROGRAM ON HEALTH PROBLEMS OF THE POOR ON PROPOSED RULES FOR HILL-BURTON PROGRAM 4-21.

<sup>12</sup> 42 U.S.C. §§ 291-291o (1970). Hill-Burton is a program by which the federal government channels construction funds to hospitals through the states. States wishing to participate conduct a statewide survey and inventory of existing facilities and develop a state plan for construction. *Id.* § 291d(a). The state must determine need for additional facilities, *id.* § 291d(a)(4), priority for construction, *id.* 291d(a)(5), and provide minimum standards for maintenance and operation of facilities, *id.* § 291(a)(7). Recipient hospitals agree to provide a reasonable amount of free or reduced cost care to those unable to pay. *Id.* § 291c(e).

<sup>13</sup> See, e.g., *Cook v. Ochsner Foundation Hospital*, 319 F.Supp. 603 (E.D. La. 1970) (upholding a private right of action in affected parties); *Euresti v. Stenner*, 327 F. Supp. 111 (D. Colo. 1971), *rev'd*, 40 U.S.L.W. 2652 (10th Cir. April 4, 1972) (dismissal reversed on the ground that there is a private right of action under Hill-Burton).

<sup>14</sup> See notes 4-6 and accompanying text *supra*.

recently migrated. States have programs providing free hospital services to indigents who meet certain eligibility requirements, one of which is likely to be a durational residency requirement in the county or state.<sup>15</sup> Such requirements effectively exclude from eligibility those who have recently moved into the jurisdiction.<sup>16</sup>

This article seeks to accomplish two purposes: to analyze recent constitutional developments to determine whether the unavailability of inpatient hospital services<sup>17</sup> to the medically indigent<sup>18</sup> works a denial of equal protection of the laws, and then to survey legislative action as well as stop-gap action by the courts designed to correct any such denial of equal protection.<sup>19</sup>

## II. HOSPITAL SERVICES AND EQUAL PROTECTION

Hospital admissions criteria resting on either ability to pay for services or ability to make a deposit create a classification based on wealth. Some states further distinguish among those unable to pay by providing free hospital care to some indigents while denying the same services to others who fail to meet durational residency requirements.

### A. State Action

Some states authorize counties and cities to establish and maintain public hospitals.<sup>20</sup> When these public institutions deny admission to the indigent, state action clearly is involved.<sup>21</sup> Where the

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<sup>15</sup> See, e.g., KAN. STAT. ANN. § 39-416 (Supp. 1971) (one year in the county and two of the last four years in the state); GA. CODE ANN. §§ 88-2302(e) and 88-2302(f) (1971) (six months in the state).

<sup>16</sup> See *Valenciano v. Bateman*, 323 F. Supp. 600 (D. Ariz. 1971), where the court held a requirement of twelve months residence in the county violative of equal protection.

<sup>17</sup> Inpatient hospital services include bed and board, nursing services, use of hospital facilities, medical-social services, drugs, biologicals, supplies, appliances, equipment, diagnostic and therapeutic items, and medical or surgical services furnished by a physician, resident, or intern when billed through the hospital.

<sup>18</sup> See note 4 *supra*.

<sup>19</sup> For discussion of other aspects of the health care problem, see *Symposium—Health Problems of the Poor*, 1970 WIS. L. REV. 641 (1970); *Health Care Symposium*, 35 LAW & CONTEMP. PROB. 229, 667 (pts. I & II) (1970); Rose, *Hospital Admission of the Poor and the Hill-Burton Act*, 3 CLEARINGHOUSE REV. 185 (1969); Rose, *The Duty of Publicly-Funded Hospitals to Provide Services to the Medically Indigent*, 3 CLEARINGHOUSE REV. 254 (1970); Cullen, *Hospital Duty to Provide Emergency Medical Care for the Indigent and Medically Indigent*, 4 CLEARINGHOUSE REV. 287 (1970).

<sup>20</sup> See, e.g., CAL. HEALTH AND SAFETY CODE § 1441 (West 1970); COLO. REV. STAT. § 139-32-1(31) (1963).

<sup>21</sup> See *Foster v. Mobile County Hosp. Bd.*, 398 F.2d 227 (5th Cir. 1968), where a hospital created by act of the state legislature and having received both state and federal funds was held to be a public institution involved in state action. Plaintiff's denial of admission to the medical staff of the hospital was held to be a violation of equal protection where admittance was conditioned upon obtaining signatures of two members of the active

hospital in question is not authorized and maintained by a state or political subdivision, but rather is a private concern, the question of state action becomes more difficult. However, various factors of state involvement in the operation of the private hospital can be isolated, particularly state aid to the hospital and regulation of the operation and construction of the hospital, the total constitutional effect of which may be state action.

State aid to a private hospital takes several forms. The state may directly appropriate funds or grant property to the hospital; it may indirectly subsidize the hospital through payments for charity or welfare patients; or it may grant property tax exemptions to nonprofit hospitals. The United States Court of Appeals for the Fourth Circuit in *Simkins v. Moses H. Cone Memorial Hospital*<sup>22</sup> relied heavily on the fact that the private hospitals in question had received large construction grants through the Hill-Burton program<sup>23</sup> in determining that racial discrimination by the hospitals involved state action.<sup>24</sup> The same court also relied on grants of state construction funds to a private hospital in *Eaton v. Grubbs*<sup>25</sup> to support its finding of state action. Significantly, these funds were not received through the Hill-Burton program.

Private hospitals also receive financial support through welfare or Medicaid payments or subsidies for the care of indigents.<sup>26</sup> These payments are more properly viewed as aid to the individuals receiving services rather than to the hospitals. They no more turn a private hospital into a state agency than would payments by a welfare recipient to a grocer or a landlord make them state agencies.<sup>27</sup>

Most states provide indirect financial assistance to non-profit private hospitals in the form of property tax exemptions.<sup>28</sup> In *Burton v. Wilmington Parking Authority*<sup>29</sup> the Supreme Court

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staff. See also *Sosa v. Bd. of Managers of Val Verde Memorial Hosp.*, 437 F.2d 173 (5th Cir. 1971), where a county hospital established pursuant to Texas statute and constructed, maintained, and operated with county funds was held to be engaged in state action. The court remanded the case for a determination of whether procedural due process was denied when a physician was excluded from the medical staff for failure to meet ethical and professional qualifications.

<sup>22</sup> 323 F.2d 959 (4th Cir. 1963), cert. denied, 376 U.S. 938 (1963).

<sup>23</sup> The court found the state and federal government to be involved in the geographical proration of facilities, massive distribution of public funds, and extensive state-federal sharing in the common plan. See also note 12 *supra*.

<sup>24</sup> For a discussion of *Simkins*, see Comment, *State Action, State Law and the Private Hospital*, 62 MICH. L. REV. 1433 (1964); Comment, *Public Control of Private Sectarian Institutions Receiving Public Funds*, 63 MICH. L. REV. 142 (1964).

<sup>25</sup> 329 F.2d 710 (4th Cir. 1964).

<sup>26</sup> See notes 1 and 5 *supra*. This article is not concerned with such indigent recipients.

<sup>27</sup> See Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083 (1960).

<sup>28</sup> See, e.g., COLO. REV. STAT. § 137-1-3(5) (1963).

<sup>29</sup> 365 U.S. 715 (1960).

considered such tax immunity an important factor in creating the entanglements between the private restaurant and the government agency which resulted in a holding that discrimination by the restaurant was state action. Similarly the *Eaton* court considered the tax exemption which the hospital enjoyed significant to a finding of state action when considered in relation to other factors of state involvement.<sup>30</sup>

Perhaps more indicative of state action than the amount of state aid is the degree of control which the state retains over the hospital. States exercise continuing control by attaching explicit conditions to financial aid and reserving authority to appoint the governing body of the hospital.<sup>31</sup> Particularly when the form of the state aid is a grant of real property, a significant factor is the amount of control the state or subdivision retains over the hospital. For example, the *Eaton* court pointed to a deed of property to the hospital containing a reverter whereby the property went back to the city and county should it cease to be used for hospital purposes.<sup>32</sup> Similarly, state participation in the Hill-Burton program is evidence of control amounting in some cases to state action.<sup>33</sup> For example, the *Simkins* court found it significant that the Hill-Burton law required private hospitals that were applicants to be "integral parts of joint or intermeshing state and federal plans or programs."<sup>34</sup> Also in *Eaton* the court noted that although the hospital had not participated in the Hill-Burton program, the minutely detailed regulations which North Carolina had adopted to cover all hospitals in the state pursuant to the state's participation in the program nonetheless applied to the hospital in question.<sup>35</sup>

<sup>30</sup> 329 F.2d at 714.

<sup>31</sup> See, e.g., *Meredith v. Allen County War Memorial Hosp. Comm.*, 397 F.2d 33 (6th Cir. 1968), where a hospital was held to be engaged in state action when the hospital commission was appointed by the governing body of the county, and the hospital was the only one in the area and was financed in part by public funds.

<sup>32</sup> 329 F.2d at 713. See also *Hampton v. City of Jacksonville*, 304 F.2d 320 (5th Cir. 1962), *cert. denied sub nom.*, *Ghioto v. Hampton*, 371 U.S. 911 (1962), where sufficient control to indicate state action was found when two golf courses would revert to the city if they ceased to be used as such; *Smith v. Holiday Inns*, 220 F. Supp. 1 (M.D. Tenn. 1963), *aff'd as modified*, 336 F.2d 630 (6th Cir. 1964), where state action was found when the state housing authority had cleared and redeveloped the land and retained restrictive covenants. *But cf.* *Dorsey v. Stuyvesant Town Corp.*, 299 N.Y. 512, 87 N.E.2d 541 (1949), *cert. denied*, 339 U.S. 981 (1951), where a finding of no state action was upheld although the housing project in question was constructed in accordance with a plan approved by the city planning commission, the land had been obtained by use of eminent domain, and the city regulated rents and maintained other regulations.

<sup>33</sup> See note 12 *supra*. For example of state statutory compliance with the Hill-Burton Act, see COLO. REV. STAT. § 66-18-1 (1963); IND. STAT. ANN. § 35-290 (1969).

<sup>34</sup> 323 F.2d at 967.

<sup>35</sup> 329 F.2d at 713. See also *Sams v. Ohio Valley General Hosp. Ass'n.*, 413 F.2d 826 (4th Cir. 1969), discussed in text accompanying notes 39-41 *infra*, where the court held the hospital's participation in the Hill-Burton program as significant to a finding of state action.

States also regulate hospitals through licensing and inspection laws.<sup>36</sup> Since it often indicates only the attainment of minimum standards, licensing alone probably would not indicate sufficient state involvement.<sup>37</sup> In some states licensing entails more than certification of minimum standards. Under what is called certificate of need legislation, hospitals must obtain state approval of construction of new facilities in order to obtain licenses to operate them.<sup>38</sup> Approval depends upon a finding of need for the additional facility in the community. By assuming control over the availability of hospital facilities the state has a responsibility to see to it that they are open to all on a non-discriminatory basis. Subsequent unavailability of services to the medically indigent in such facilities would appear to be the result of state action.

Findings of state action based on aid and control are not limited to cases involving racial discrimination. In *Sams v. Ohio Valley General Hospital Association*<sup>39</sup> the Fourth Circuit held that three physicians were denied equal protection when refused staff appointments and privileges by two private hospitals on the ground that their offices and practices were located outside the county. The hospitals' participation in the Hill-Burton program<sup>40</sup> was the primary basis for a finding of state action.<sup>41</sup>

In short, there frequently will be a nexus between the hospital and the state for a court to reach a conclusion that discrimination by the hospital is state action. The most significant factor of aid and control results from state participation in the Hill-Burton program. Thus Congress is responsible for bringing most hospitals within the scope of the fourteenth amendment by inducing states to participate in the program.

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<sup>36</sup> See, e.g., CONN. GEN. STAT. ANN. §§ 19-33, -38 (1969); FLA. STAT. ANN. §§ 395.03, .09 (1960).

<sup>37</sup> See *Williams v. Howard Johnson's Restaurant*, 268 F.2d 845 (6th Cir. 1968), where racial discrimination by a private restaurant was not state action despite state laws licensing restaurants to serve the public. The laws were designed to protect the health of the community and not to authorize state control of management of the business or determination concerning whom to serve. *Id.* at 848. However, in *Grier v. Specialized Skills, Inc.*, 326 F. Supp. 856 (W.D.N.C. 1971), the court found state action in a case involving a private barber school which denied services and training to Blacks. A person seeking a barber's license in North Carolina must attend an approved and licensed school. Since all such barber schools were segregated and there was no Black school in the area, the licensing requirement resulted in virtual state exclusion of Blacks from barbering. In the context of hospital admissions, then, mere licensing may be relevant where the only hospital in the area discriminates against indigents.

<sup>38</sup> See, e.g., N.Y. PUB. HEALTH LAW §§ 2801-a, 2802 (McKinney 1971); R.I. GEN. LAWS § 23-16-12 (Supp. 1971). For a survey of state certificate of need legislation see Division of Planning, American Hospital Association, Survey of State Certificate of Need Legislation 1970, June, 1970.

<sup>39</sup> 413 F.2d 826 (4th Cir. 1969).

<sup>40</sup> See note 12 *supra*.

<sup>41</sup> See also *Meredith v. Allen County War Memorial Hosp. Comm.*, 397 F.2d 33 (6th Cir. 1968), discussed in note 31 *supra*.

### B. Equal Protection

Assuming the facts would support a finding of state action, the question remains whether a hospital violates a medically indigent person's right to equal protection of the laws<sup>42</sup> when it denies him admittance because of his likely inability to pay. Traditionally, in testing for a violation of equal protection, courts have inquired only whether the statutory classification in question was rationally related to a legitimate governmental objective,<sup>43</sup> with the burden of proving irrationality on the challenger.<sup>44</sup> Applying this test, it appears reasonable for a state to protect its funds by restricting hospital care to those who can pay or to those for whom the state has committed itself to pay.<sup>45</sup>

There is, however, another, more demanding test when the classification involved is "suspect" or infringes upon a "fundamental right."<sup>46</sup> Racial classifications are especially suspect and are the subject of rigid scrutiny. In *Loving v. Virginia*<sup>47</sup> the Court invalidated Virginia's miscegenation statute because it violated equal protection. The Court there stated that to pass the rigid scrutiny test racial classifications "must be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination."<sup>48</sup> Applying this stricter test to the denial of admission to hospitals, once it was established that indigents were discriminated against, the burden would shift to the state to show that such discrimination accomplished a permissible state objective. Moreover, such discrimination would have to be *necessary* to accomplish the objective. In like manner more than a rational connection between the durational residency requirement and the accomplishment of the state objective would be required; use of the term "necessary" implies that alternatives less harsh

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<sup>42</sup> U.S. Const. amend. XIV, § 1. "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

<sup>43</sup> *New York Rapid Transit Corp. v. New York*, 303 U.S. 573, 578 (1938).

<sup>44</sup> *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79 (1911).

<sup>45</sup> See *Fullington v. Shea*, 320 F.Supp. 500 (D. Colo. 1970), *aff'd without opinion*, 404 U.S. 963 (1971), where the court held the state did not deny equal protection by including the categorically needy, *i.e.*, those persons who receive cash payments under one of the categorical federal-state public assistance programs, in its Medicaid program but refusing to extend coverage to the medically needy. The court applied the rational basis test and found it rational for the state to limit its program in order to eliminate administrative difficulty, excessive medical expenses and resultant waste, and to preserve revenue.

<sup>46</sup> *Shapiro v. Thompson*, 394 U.S. 618, 658 (1969) (Harlan, J., dissenting), discussed in text accompanying notes 75-78 *infra*; *Loving v. Virginia*, 388 U.S. 1 (1967), discussed in text accompanying notes 47 and 50 *infra*. For an extensive examination of equal protection doctrine, see *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

<sup>47</sup> 388 U.S. 1 (1967).

<sup>48</sup> *Id.* at 11.



than those "means which unnecessarily burden or restrict constitutionally protected activity" be unavailable.<sup>49</sup>

In its holding in *Harper v. Virginia Board of Elections*,<sup>50</sup> the Supreme Court at least strongly suggested that wealth is also a suspect classification. The Court there held that conditioning the right to vote on the affluence of the voter or on the payment of a fee or tax violated equal protection. Mr. Justice Douglas wrote that "[l]ines drawn on the basis of wealth or property, like those of race, are traditionally disfavored."<sup>51</sup> Nevertheless, the Court has yet to face the situation where a state discriminates directly against indigents as such. Instead, in the cases decided by the Court, the discrimination resulted from equal application of a rule having an unequal effect because of the poverty of the persons affected.<sup>52</sup> If a state ruled that no indigents could be admitted to a hospital, the discrimination would be direct and almost certainly subject to rigid scrutiny.

As in other wealth discrimination cases, indigents are not denied admission solely because of their status of indigency but because that status makes it impossible for them to raise the preadmission deposit or makes them a poor credit risk to the hospital.<sup>53</sup> However, in contrast to the classifications based on wealth which the Court has held unconstitutional, classifications resulting in a denial of hospital services do not infringe a fundamental right.<sup>54</sup> The Court is not going to invalidate every indirect

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<sup>49</sup> *Dunn v. Blumstein*, 40 U.S.L.W. 4269, 4273 (U.S. March 21, 1972), discussed in text following note 79 *infra*.

<sup>50</sup> 383 U.S. 663 (1966).

<sup>51</sup> *Id.* at 668. In strong dictum in *McDonald v. Bd. of Election*, 394 U.S. 802 (1969), the Court said,

a careful examination on our part is especially warranted where lines are drawn on the basis of wealth or race, . . . two factors which would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny.

394 U.S. at 807 (citation omitted). The Court held that Illinois' failure to provide absentee ballots for unsentenced inmates of the Cook County jail awaiting trial did not violate equal protection. For a comparison of classifications based on wealth and race see Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection and the Indigent*, 21 STAN. L. REV. 767 (1969).

<sup>52</sup> In *Griffin v. Illinois*, 351 U.S. 12 (1956), trial transcripts were provided to those who could pay for them; only the indigency of the appellants prevented them from obtaining them. Nonetheless, the Court held this to be a denial of equal protection and due process. In *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966), the payment of the poll tax was required of all who wished to vote. The indigents were denied the vote only because they could not pay the tax.

<sup>53</sup> See text accompanying notes 9-11 *supra*. Justice Douglas views even indirect discrimination based on wealth as sufficiently invidious to call for the strict standard of review. *Boddie v. Connecticut*, 40 U.S. 371, 383 (1971) (concurring opinion).

<sup>54</sup> See *Fullington v. Shea* 320 F.Supp. 500, 506 (D. Colo. 1970), *aff'd without opinion*, 404 U.S. 963 (1971), discussed in note 45 *supra*, where the court implicitly held that hospital services are not a fundamental right and applied the rational basis test. Since

discrimination against the poor where the interest affected is not fundamental. Take, for example, *James v. Valtierra*.<sup>55</sup> California passed a state constitutional amendment requiring low-income housing to be approved by local referenda. This clearly subjected the poor to special treatment, making it more difficult for them to obtain low-rent housing.<sup>56</sup> The United States Supreme Court, reversing a three judge federal district court,<sup>57</sup> held the amendment not violative of equal protection. Justice Black wrote for the majority that "a lawmaking procedure that 'disadvantages' a particular group does not always deny equal protection."<sup>58</sup>

It remains to be seen whether the Court will follow *James* and refuse to apply the stricter standard of review to cases where an indirect discrimination based on wealth does not infringe a fundamental right. Arguably, where the affected interest is of great importance, although not fundamental, rigid scrutiny should nonetheless be applied.<sup>59</sup> It is illogical to assure an indigent the right to vote,<sup>60</sup> a free trial transcript,<sup>61</sup> or appellate counsel,<sup>62</sup> but deny him the necessity of medical care. Furthermore, the statements by the Court that discrimination based on wealth requires stricter scrutiny would be meaningless if only cases involving fundamental rights drew the stricter review, because in those cases the compelling state interest test would be applied regard-

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Medicaid benefits include hospital care, their denial, if hospital care were a fundamental right, would have called for application of the compelling state interest test. *Harper* involved voting and *Griffin* involved criminal justice.

<sup>55</sup> 402 U.S. 137 (1971).

<sup>56</sup> In a similar situation involving racial classification the Supreme Court in *Hunter v. Erickson*, 393 U.S. 385 (1969), held invalid a city charter amendment which required open housing ordinances to be approved by referendum. This made it more difficult for groups seeking protection of the law to obtain it. The *James* Court stated that *Hunter* relied on distinctions based on race while *James* did not. 402 U.S. at 141. The Court declined to extend *Hunter* beyond racial discriminations, 402 U.S. at 141.

<sup>57</sup> *Valtierra v. Housing Authority of the City of San Mateo*, 313 F. Supp. 1 (N.D. Cal. 1970) (three judge court).

<sup>58</sup> 402 U.S. at 142. It may be significant that the decision was five to three with two members of the majority no longer on the Court and with Justice Douglas taking no part in the decision. Justice Douglas could be expected to side with the minority in other cases involving wealth discrimination. See note 53 *supra*.

<sup>59</sup> See Justice Black's dissent to the denial of certiorari in *Meltzer v. C. Buck LeCraw & Co.*, 402 U.S. 954 (1971), which involved the denial to indigents of access to civil courts because they could not pay fees. Justice Black argued that the court should not distinguish the case from *Boddie v. Connecticut*, 401 U.S. 371 (1971), merely because *Boddie* involved the right to a divorce. He said that "the need to be on the welfare rolls or to file for a discharge in bankruptcy seems to me to be more 'fundamental' than a person's right to seek a divorce." 402 U.S. at 958.

<sup>60</sup> *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966). See notes 52-54 and accompanying text *supra*.

<sup>61</sup> *Griffin v. Illinois*, 351 U.S. 12 (1956), discussed in note 52 *supra*.

<sup>62</sup> *Douglas v. California*, 372 U.S. 353 (1963). The Court held that to deny appellate counsel to an indigent violated equal protection and due process.

less of the suspect classification.<sup>63</sup> Invoking the suspect classification would be mere surplusage.<sup>64</sup>

Inpatient hospital services are of such importance that discriminatory classifications resulting in their denial should be subjected to rigid scrutiny. Support for this proposition can be gained by a comparison with welfare benefits. Although the right to receive welfare benefits has not been held fundamental,<sup>65</sup> it has been accorded an important status by the courts.<sup>66</sup> Like welfare benefits, hospital services are essential to the preservation of health and life.<sup>67</sup>

In summary, when a suspect classification, even though indirect, results in the denial of a very important interest, the stricter standard of review should be applied. Denial of hospital services to indigents is based on the suspect classification of wealth, and results in the denial of an important interest—necessary hospital care. Thus, close judicial scrutiny should be applied to determine whether a violation of equal protection exists.

<sup>63</sup> *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969), discussed in text accompanying notes 75–78 *infra*.

<sup>64</sup> See note 46 and accompanying text *supra*.

<sup>65</sup> See *Dandridge v. Williams*, 397 U.S. 471 (1970), where the Court used the traditional rational basis test in a welfare case to determine that a state does not deny equal protection by imposing a maximum limit on the size of a welfare grant to a family regardless of the number of its members. In determining which test to apply the Court will examine three interests. *Dunn v. Blumstein*, 40 U.S.L.W. 4269, 4271 (U.S. March 21, 1972); see text accompanying note 87 *infra*. A finding of a fundamental right is prerequisite to closer scrutiny. In determining the fundamental nature of a given right, the Court may be influenced by the fact that invalidation of a state spending scheme for social welfare benefits will involve a massive redistribution of state resources. In *Dandridge* invalidation of the state maximum levels for family benefits would have forced the state to incur greater expenditures.

<sup>66</sup> In *Goldberg v. Kelly*, 397 U.S. 254 (1970), decided two weeks before *Dandridge*, the Court held that welfare benefits could not be halted consistent with due process without a prior hearing.

For qualified recipients, welfare provides the means to obtain essential food, clothing, housing, and medical care. . . . Thus the crucial factor in this context . . . is that termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits.

397 U.S. at 264. Several commentators have discussed welfare as a right. See generally Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1255–56 (1965); Reich, *The New Property*, 73 YALE L.J. 733 (1964); Graham, *Public Assistance: The Right to Receive, the Obligation to Repay*, 43 N.Y.U.L. REV. 451 (1968).

<sup>67</sup> Justice Marshall stated that when a benefit is necessary to sustain life, stricter constitutional standards are applied to the deprivation of that right. *Dandridge v. Williams*, 397 U.S. 471, 522 (1970) (dissenting opinion). See also *Valenciano v. Bateman*, 323 F. Supp. 600, 603 (D. Ariz. 1971), where the court held hospitalization and medical care for indigents to be benefits essential to the preservation of health and life in the context of the holding in *Shapiro* which concerned welfare.

### *C. Durational Residency Requirements and the Right to Travel*

Some states provide hospital services to indigents but differentiate among those who otherwise meet eligibility requirements of medical and financial need by requiring a period of residence in the state<sup>68</sup> or county<sup>69</sup> as a condition precedent to assistance.<sup>70</sup> These requirements create two classes of indigents, indistinguishable except for the term of their residence within the state or county.<sup>71</sup>

There is a constitutional right to travel,<sup>72</sup> and recent decisions suggest that denying hospital admission to indigents who have recently migrated would infringe this fundamental right. Although the Supreme Court has never attributed the right to travel to a single provision of the Constitution,<sup>73</sup> four sources of the right have been advanced.<sup>74</sup> In *Shapiro v. Thomp-*

<sup>68</sup> See, e.g., GA. CODE ANN. §§ 88-2302(e), (f) (1971) (six months).

<sup>69</sup> See, e.g., KAN. STAT. ANN. § 39-416 (Supp. 1971) (one year in the county and two of the last four years in the state); N.M. STAT. ANN. § 13-2-13 (Supp. 1971) (permitting counties to establish up to a three-month period).

<sup>70</sup> See notes 15 and 16 and accompanying text *supra*.

<sup>71</sup> This article is not concerned with the question of states restricting benefits to bona fide residents. Here the concern is with the imposition of durational residency requirements on newly arrived, bona fide residents.

<sup>72</sup> *United States v. Guest*, 383 U.S. 745, 757, 758 (1966). The Court held a federal statute, which imposes criminal penalties for conspiracy to interfere with a person's federally secured rights, constitutional and able to reach conspiracies specifically directed against the exercise of the constitutional right to travel interstate.

<sup>73</sup> 383 U.S. at 759.

<sup>74</sup> *Shapiro v. Thompson*, 394 U.S. 618, 630 n.8 (1969). The four sources are (1) the privileges and immunities clause of article IV, section 2, see, e.g., *Corfield v. Coryell*, 6 F. Cas. 546 (No. 3230) (C.C.E.D.Pa. 1825) (Washington, J.); (2) the commerce clause of article I, section 8, see, e.g., *Edwards v. California*, 314 U.S. 160 (1941); (3) the privileges and immunities clause of the fourteenth amendment, see, e.g., *Edwards v. California*, 314 U.S. 160, 183-85 (1941) (Douglas and Jackson, JJ., concurring), *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1867); and (4) the due process clause of the fifth amendment, see, e.g., *Shapiro v. Thompson*, 394 U.S. 618, 671 (1969) (dissenting opinion), *Kent v. Dulles*, 357 U.S. 116 (1958), *Aptheker v. Secretary of State*, 378 U.S. 500 (1964). The specific source of the right would not be important where state residency for a specific period is required for qualification for assistance. The Supreme Court in *Shapiro* held state residency requirements unconstitutional without determining a specific source. 394 U.S. at 630.

Where the requirement is durational residency in a county, however, the specific source would be relevant. The power of the state to restrict intrastate migration would not be affected by the commerce clause which reaches only interstate travel. *Ware & Leland v. Mobile County*, 209 U.S. 405, 409 (1908). Article IV, section 2 restricts a state from discriminating against residents of other states, but not against its own residents. *Hague v. C.I.O.*, 307 U.S. 496 (1939) (Roberts, J.). Congress would be able to regulate migration if the source were the commerce clause, *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946), or the privileges and immunities clause of the fourteenth amendment, *Shapiro v. Thompson*, 394 U.S. 618, 688 (1969) (Harlan, J. dissenting). Determining the source of the right to travel to be an aspect of personal liberty protected by due process would give protection from either state or federal infringement, with no distinction between interstate and intrastate migration. Although Justice Harlan determined the source of the right to be in due process and his analysis determined the restriction to be constitutional, 394 U.S. at 676, his analysis is distinguishable from the present situation. While the right may emanate

son<sup>75</sup> the Supreme Court invalidated on equal protection grounds one-year residency requirements for eligibility for welfare. Such requirements created two classes of needy persons indistinguishable, as in the medical services context, except for length of residence. The states' purposes of deterring an influx of indigents or limiting benefits to those earlier contributing taxes to the state, said the Court, were constitutionally impermissible.<sup>76</sup> The Court then examined the interests of the state in maintaining the classification. The potential recipients had exercised their constitutional right to travel and any classification which *penalized* the exercise of that right must be justified by a compelling state interest.<sup>77</sup> Finding none of the interests advanced by the state compelling, the Court invalidated the requirements. The Court complicated its holding by dropping a footnote stating that some durational residency requirements might be valid not only because they could meet the compelling state interest test but also because they would not penalize a person exercising his right to travel.<sup>78</sup> Recently, in *Dunn v. Blumstein*,<sup>79</sup> the Supreme Court stated that travel need not be deterred before a penalty is incurred. There the Court held durational residency requirements of one year in the state and three months in the county for voter registration denied equal protection because the classifications created thereby penalized the right to travel. The requirements were not necessary, under the compelling state interest test, to further the state interests in purity of the ballot or voter knowledgeability.

Durational residency requirements for eligibility for free hospital services, therefore, must first be determined to be a penalty on the right to travel before the compelling state interest test applies. A number of decisions have interpreted the Supreme Court's holding in *Shapiro v. Thompson* to the effect that the right to travel may not be penalized by conditioning other governmental benefits on periods of residency.<sup>80</sup> Some have concluded that travel must actually be deterred before there is a penalty. For

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from the fifth amendment, the clause of action is based on a claim of denial of equal protection. Thus, a balancing approach such as the one employed by Justice Harlan is appropriate where due process is denied, *Goldberg v. Kelly*, 397 U.S. 254 (1970), but the compelling state interest test is appropriate where a denial of equal protection is concerned, 394 U.S. at 638.

However, the right to travel may be so fundamental that it should not be limited to a specific source. Rather, it inheres in all four of the relevant provisions of the Constitution.

<sup>75</sup> 394 U.S. 618.

<sup>76</sup> *Id.* at 633.

<sup>77</sup> *Id.* at 634.

<sup>78</sup> *Id.* at 638 n.21.

<sup>79</sup> 40 U.S.L.W. 4269 (U.S. March 21, 1972).

<sup>80</sup> See *Cole v. Housing Authority of the City of Newport*, 435 F.2d 807, 810 (1st Cir. 1970). The court held two-year residency requirements in the city for low-income housing

example, in *Kirk v. Board of Regents of the University of California*<sup>81</sup> a California appellate court held that travel would not be deterred by one-year residency requirements for in-state student status. While the *Kirk* court's determination that deterrence is essential to a finding of a penalty is undoubtedly wrong in light of the discussion in *Dunn*, where the Court stated that deterrence is not required,<sup>82</sup> the *Kirk* decision may still be good law. The Court in *Dunn* stated that three things must be considered to determine whether a law violates equal protection: the character of the classification, the individual interests affected thereby, and the governmental interests asserted.<sup>83</sup> As the court in *Kirk* properly recognized, the individual interest in higher education is less substantial than the immediate and pressing need for the preservation of life and health involved in *Shapiro*.<sup>84</sup> Thus, the stricter standard of the compelling state interest test was not warranted although the right to travel was infringed.

In any event, the indigent's interest in hospital care is more closely akin to his interest in the welfare benefits affected in *Shapiro* because both are essential to the preservation of his health and life. Therefore, a court could find durational residency requirements for eligibility for hospital services to be a penalty on the fundamental right to travel. Thus, the classification created by the residency requirements must be justified by a compelling state interest because it penalizes the exercise of the fundamental right.<sup>85</sup> The interests asserted by the state to support the discrimination against new residents would have to be compelling and the discrimination would have to be necessary to further these interests, meaning that less harsh alternatives to the discrimination would not sufficiently further the state objectives.

#### *D. State Interests in Classifications Based on Ability to Pay or on Fulfillment of Residency Requirements*

Because the classifications involved in the denial of hospital

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denied equal protection; in *Vaughan v. Bower*, 313 F.Supp. 37 (D. Ariz.), *aff'd*, 400 U.S. 884 (1970), a three judge panel held unconstitutional an Arizona statute permitting a mental hospital superintendent to return patients to the state of their prior residence if they had not lived in Arizona for one year.

<sup>81</sup> 273 Cal. App. 2d 430, 78 Cal. Rptr. 260 (1969), *appeal dismissed*, 396 U.S. 554 (1970).

<sup>82</sup> 40 U.S.L.W. at 4272.

<sup>83</sup> 40 U.S.L.W. at 4271.

<sup>84</sup> 273 Cal. App. 2d at 440, 78 Cal. Rptr. at 266-67.

<sup>85</sup> *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969).

services are suspect when based on wealth and penalize the exercise of a fundamental right when based on durational residency requirements, they require strict judicial scrutiny. The Supreme Court has never explicitly stated that rigid scrutiny means a compelling state interest test will be applied,<sup>86</sup> but recent decisions suggest that this is the test.<sup>87</sup> It is necessary to examine what possible state interests are achieved by the classifications and then determine whether such interests are permissible and whether the challenged classification is necessary to achieve those interests.

*1. Maintaining Fiscal Integrity*—The state does have a “valid interest in preserving the fiscal integrity of its program.”<sup>88</sup> Requiring hospitals to treat all in need of care might increase state expenditures, at least in the short run, because in most cases the state would also have to assume the financial burden where private hospitals were involved.<sup>89</sup> Increased costs might be the result of increased utilization or, where adequate facilities are not available to treat all, different methods of patient selection.

Additional expenditures are not necessary to alleviate discrimination. The state would only be required to make existing hospital care facilities available on a nondiscriminatory basis. Thus, neither construction of new facilities nor additional services would be required to bring provision of hospital care within the constitutional requirements. The state could maintain total costs by reducing the amount of available care to each individual and by making hospital services available only to the extent the state would be able to provide them.<sup>90</sup>

When asserting the interest in maintaining fiscal integrity the state should be required to show that in the long run it would be more expensive to provide hospital services to all indigents. Ad-

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<sup>86</sup> Justice Harlan stated that the Court applied the compelling state interest test when a suspect classification or fundamental right was involved. *Shapiro v. Thompson*, 394 U.S. 618, 658 (1969) (dissenting opinion).

<sup>87</sup> In *Graham v. Richardson*, 403 U.S. 365 (1971), the Court held that states denied equal protection to aliens when they imposed durational residency requirements on aliens or limited benefits for welfare to citizens of the United States. The classification based on alienage is suspect and subject to strict judicial scrutiny, but the Court relied heavily on *Shapiro* which utilized the compelling state interest test where a fundamental right was involved.

<sup>88</sup> *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969). The state has leeway in allocating its available resources among programs as it sees fit, but the state may not invidiously discriminate among recipients in allocation of these resources. *Dandridge v. Williams*, 397 U.S. 471, 483 (1970).

<sup>89</sup> The national average for hospital expenses per patient day in 1970 was \$81.01. The average stay was 8.2 days per patient. *Hospitals Pt. II, Guide Issue*, J. AM. HOSP. ASS'N 452, 462 (Aug. 1, 1971).

<sup>90</sup> Although this would result in fewer services being available to those able to pay, increased public pressure would undoubtedly increase over-all services in the long run.

mittedly, initial costs would be higher because of the administrative changes and the chronic physical conditions of indigents who have gone without essential hospital care in the past. Over a lengthier time span, however, providing equal care might reduce overall state costs. Lack of hospital care may cause the patient's condition to deteriorate to a point where emergency hospitalization is required.<sup>91</sup> Not only may more and longer hospital care be required,<sup>92</sup> but the indigent's family may become a burden on the state's welfare rolls for the duration of his illness or permanently if his capacity to work is impaired.

Even if the state could show that providing hospital care would cost the state more money, in other contexts the Supreme Court has not deemed this a sufficiently compelling reason to allow continued discrimination by suspect classifications.<sup>93</sup> Although saving money is a legitimate state objective, it may not be accomplished by invidious discrimination against indigents.<sup>94</sup>

2. *Administrative Convenience*—The interest in not becoming overburdened with administrative problems of determining eligibility for services is a legitimate state objective.<sup>95</sup> Because there are ways of lessening these difficulties, however, they would not be sufficiently compelling to permit continued discrimination.<sup>96</sup> The initial criterion of need for hospital services is objec-

<sup>91</sup> A hospital may be under a duty to provide emergency care because of public reliance on the existence of an emergency room, *Wilmington General Hosp. v. Manlove*, 54 Del. 15, 174 A.2d 135 (1961), or because of a statutorily imposed duty, e.g., ILL. STAT. ANN. ch. 111 1/2 § 86 (Supp. 1972). See also Powers, *Hospital Emergency Service and the Open Door*, 66 MICH. L. REV. 1455 (1968); Cullen, *Hospital Duty to Provide Emergency Medical Care for the Indigent and the Medically Indigent*, 4 CLEARINGHOUSE REV. 287 (1970).

<sup>92</sup> "Lower income persons tend to be admitted to the hospital at a higher rate and have longer lengths of stay than higher income persons." Richardson, *Poverty, Illness, and Use of Hospital Services in the United States*, 43 HOSPITALS, July 1, 1969, at 42.

<sup>93</sup> See *Graham v. Richardson*, 403 U.S. 365, 376 (1971), discussed in note 87 *supra*; as a result of the *Griffin* and *Douglas* decisions, both of which went off on equal protection and due process grounds, the state would have to incur additional expenses to provide trial transcripts and appellate counsel to indigents.

<sup>94</sup> In *Shapiro v. Thompson*, 394 U.S. 618 (1969), the Court stated:

We recognize that a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a state may not accomplish such a purpose by invidious distinctions between classes of its citizens. It could not, for example, reduce expenditures for education by barring indigent children from its schools.

394 U.S. at 633.

<sup>95</sup> Administrative difficulty was held a rational basis for maintaining the discrimination in *Fullington v. Shea*, 320 F.Supp. 500 (D. Colo. 1970), *aff'd without opinion*, 404 U.S. 963 (1971), discussed in note 45 *supra*.

<sup>96</sup> There were means of lessening the administrative burden which decreased the weight placed on that governmental interest in *Goldberg v. Kelly*, 397 U.S. 254 (1970), discussed in note 66 *supra*, which made the governmental interest insufficiently compelling in *Shapiro*, discussed in note 75 and text following *supra*.



tive—medical need. The burden of showing financial eligibility or residency could be placed on the indigent, and sliding scales of charges and long-term repayment schedules could be developed, thereby reducing the financial burden on the state and hospital. Fraud could be handled by utilizing normal collection procedures and criminal sanctions.

The administrative convenience of an objective test of residency served by the durational residency requirement is not a compelling reason for the discrimination against new residents. As the Court said in *Dunn*,

Objective information tendered as relevant to the question of bona fide residence . . . —places of dwelling, occupation, car registration, driver's license, property owned, etc.—is easy to double check, especially in light of modern communications.<sup>97</sup>

If the state relied on the applicant's statement of length of residency, a person who would lie about being a resident could as easily lie about length of residency. Any further investigation to determine duration of residency could just as easily be used to determine if the applicant were a permanent resident.

3. *Facilitation of Planning*—The state might contend that planning for facilities is made easier by limiting services to those who have been in the jurisdiction for the required period or to those able to pay, because utilization patterns have been established. Planning is a legitimate state objective. However, all states participate in the Hill-Burton program.<sup>98</sup> Pursuant to its participation in the program each state has undertaken to plan for adequate hospital facilities for indigents.<sup>99</sup> Therefore, the states should not be heard to complain that discrimination against indigents is necessary to attain the planning objectives.

The Supreme Court in *Shapiro* rejected the state's argument that a one-year residency requirement facilitated planning of the welfare budget. The state was unable to show how such a requirement was used in planning.<sup>100</sup> In the same way, a state would have to show how a durational residency requirement is used in planning for provision of hospital services. The costs of gathering data concerning potential applicants moving in and out of the state would no doubt outweigh its utility.

<sup>97</sup> 40 U.S.L.W. at 4275, discussed in text following note 79 *supra* (footnotes omitted).

<sup>98</sup> Hill-Burton Program, Progress Report, July 1, 1947–June 30, 1969, 66–67 (Public Health Service Pub. No. 930-F-3, 1969).

<sup>99</sup> 42 U.S.C. § 291c(e) (1970). See note 12 *supra*.

<sup>100</sup> 394 U.S. at 635.

### III. REMEDIES ASSURING EQUAL PROTECTION

Several proposals for national health care including provision for inpatient hospital services are before Congress. Some would go further than others in guaranteeing indigents access to hospital care.<sup>101</sup> Some do not provide coverage for all indigents.<sup>102</sup> Others would require the indigent to pay certain deductibles which could be turned into preadmission deposits by the hospital,<sup>103</sup> effectively excluding indigents because they would not be able to raise the deposits.

Congress might expand the Medicaid program. It could require states to include the medically needy in their programs<sup>104</sup> with Congress setting realistic national maximum income levels for eligibility.<sup>105</sup> Congress could provide an incentive for the states to include the medically needy by providing federal cost-sharing for the total program.<sup>106</sup>

Although hospital-applicants for Hill-Burton funds must agree to provide free or reduced cost services to those unable to pay, enforcement procedures have been lax.<sup>107</sup> The Department of Health, Education and Welfare is formulating a new regulation to define more clearly the scope of assurance and to govern its enforcement.<sup>108</sup> The new regulations should be designed to assure that hospitals will fulfill their obligations.<sup>109</sup> This would not in and of itself assure equal protection, but it would result in more available services.<sup>110</sup>

The states or Congress could require all hospitals to admit patients on the basis of medical need without regard to ability to

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<sup>101</sup> See, e.g., S. 3, 92d Cong., 1st Sess. (1971) (financing a national health security system through payroll taxes).

<sup>102</sup> E.g., H.R. 7741, 92d Cong., 1st Sess. (1971) (providing health insurance in conjunction with the Family Assistance Plan).

<sup>103</sup> *Id.* See also H.R. 4960, 92d Cong., 1st Sess. (1971) (providing services through private health insurance).

<sup>104</sup> Inclusion of the medically needy is presently optional with the states. 42 U.S.C. § 1396d(a) (1970). See note 5 *supra*.

<sup>105</sup> States may establish their own maximum income levels. 45 C.F.R. § 248.11 (1971). See note 5 *supra*.

<sup>106</sup> Federal cost-sharing is now available only for medical assistance to families whose income does not exceed 133 1/3 percent of the highest amount which would ordinarily be paid to a family of the same size without any income or resources in the form of welfare benefits, 42 U.S.C. § 1396b(f)(1)(B)(i) (1970).

<sup>107</sup> See text accompanying notes 12 and 13 *supra*.

<sup>108</sup> 37 Fed. Reg. 182 (1972).

<sup>109</sup> For suggested revisions, see NATIONAL LEGAL PROGRAM ON HEALTH PROBLEMS OF THE POOR, STATEMENT OF THE NATIONAL LEGAL PROGRAM ON HEALTH PROBLEMS OF THE POOR ON PROPOSED RULES FOR HILL-BURTON PROGRAM 23-31.

<sup>110</sup> See note 12 *supra*. Note that "reasonable amount" of services does not mean equal access by the indigent as required by equal protection.

pay or make a preadmission deposit.<sup>111</sup> Durational residency requirements should also be eliminated. States could provide adequate public hospitals or guarantee private hospitals reimbursement for care of indigent patients. Requiring private hospitals to provide services without reimbursement by the state could result in decreased services to indigents, because private hospitals in low-income areas which would bear the burden might be forced to close, while hospitals in more affluent areas would not be affected at all.

By increasing the coverage of Medicaid<sup>112</sup> the state would provide more hospital services to more indigents. More states could include the medically needy in their plans.<sup>113</sup> The maximum income levels to qualify as medically needy should be raised to at least the national poverty guidelines<sup>114</sup> which would more nearly approach actual levels of need.

Better planning could develop more equitable systems for the allocation of medical resources in short supply.<sup>115</sup> States do this to some extent now by planning for construction under the Hill-Burton program and through appropriations to state university medical schools. Some states have also developed systems for comprehensive health planning.<sup>116</sup> More effective and equitable use can be made of available resources than the fee-for-services system of allocation.<sup>117</sup>

Tax exemptions for private nonprofit hospitals could be eliminated. The assumption behind the tax exemptions for charitable institutions is that they benefit society. It is time to examine this proposition to determine whether the benefit to society warrants the cost in lost revenues which could be directed to societal needs. In lieu of tax immunity, hospitals could be reimbursed for care actually provided to indigents at reduced or no cost. This would channel funds to hospitals most in need of them based on

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<sup>111</sup> The state has wide latitude under the police power to protect the health, safety, morals and welfare of the community. *See* *Nebbia v. New York*, 291 U.S. 502 (1934), where the Court affirmed a conviction for violation of an order of the state milk control board fixing retail milk prices.

Congress may enact appropriate legislation under section five of the fourteenth amendment to enforce the equal protection clause. *See* *Katzenbach v. Morgan*, 384 U.S. 641 (1966), where the Court upheld a section of the Voting Rights Act of 1965 which prohibited denying the vote to persons who could not read or write English but who had completed the sixth grade in a school accredited by Puerto Rico.

<sup>112</sup> *See* notes 5 and 6 *supra* and accompanying text.

<sup>113</sup> Only twenty-three states include the medically needy in their plans. 1. CCH MEDICARE-MEDICAID GUIDE ¶ 15,504 (1971).

<sup>114</sup> *See* note 4 *supra*.

<sup>115</sup> *See generally* Note, *Scarce Medical Resources*, 69 COLUM. L. REV. 620 (1969).

<sup>116</sup> *See, e.g.,* CAL. HEALTH AND SAFETY CODE §§ 437-438.7 (West 1970).

<sup>117</sup> *See*, Garfield, *The Delivery of Medical Care*, 22 SCIENTIFIC AM., April, 1970, at 15.

the level of the hospitals' service to society. This would also give other hospitals not operating at full capacity an incentive to provide services to those unable to pay.

The judiciary may be the place where elimination of discrimination must begin because of the lack of political influence which the poor can exert to affect the legislative solutions suggested above.<sup>118</sup> While the courts are in a poor position to devise and supervise a remedy which would totally eliminate discrimination, the courts could use their equity powers upon a finding that denial of hospital services to indigents violates equal protection.<sup>119</sup> They could enjoin the consideration of economic means in the decision to admit a patient and the requirement of preadmission deposits. Courts could also void durational residency requirements for free hospital services as unconstitutional.<sup>120</sup> These remedies would not involve the courts in judicially unmanageable standards because the court would not become involved in the continuing operation of the hospital.

#### IV. CONCLUSION

The problems the poor of the United States face in obtaining necessary hospital care are serious. This article has attempted to point out that the denial of admission by a public or private hospital is both sufficient state involvement to indicate state action and a violation of equal protection. The classification made by providing services to those able to pay and denying them to those without means is an indirect classification based on wealth—a suspect classification. Where durational residency requirements bar services to indigents the right to travel has been penalized. In both instances the state interests advanced are insufficient to allow the discrimination to continue under the strict

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<sup>118</sup> In *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967), *aff'd as modified sub nom.*, *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969), involving school segregation by race and economic status, Judge Wright said:

It is regrettable of course, that in deciding this case this court must act in an area so alien to its expertise. It would be far better indeed for these great social and political problems to be resolved in the political arena by other branches of government. But these are social and political problems which seem at times to defy such resolution. In such situations, under our system, the judiciary must bear a hand and accept its responsibility to assist in the solution where constitutional rights hang in the balance.

269 F. Supp. at 517.

<sup>119</sup> See notes 59-67 and accompanying text *supra*.

<sup>120</sup> See *Valenciano v. Bateman*, 323 F. Supp. 600 (D. Ariz. 1971), discussed in note 16 *supra*; *Shapiro v. Thompson*, 394 U.S. 618 (1969), discussed in note 75 and text following *supra*.

standard of scrutiny which should be utilized; equal access to hospital care is constitutionally required. Solutions to the problem vary from making present facilities equally accessible by all to increasing the level of services to the poor to put them on a par with the services available to the more affluent.

—*Charles S. DeRousie*